

**BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD**

**DONALD R. BREEDLOVE<sup>1</sup>**

Claimant

V.

**RICHARDSON HAULING, INC.**

**HUTCH TRUCKING & EXCAVATING**

**CLARKSON CONSTRUCTION CO.**

Respondents

AND

**ACIG INSURANCE COMPANY**

**GENERAL CASUALTY**

Insurance Carriers

AND

**THE KANSAS WORKERS COMPENSATION FUND**

Docket No. 1,046,084

**ORDER**

Claimant requests review of the June 25, 2015, Order entered by Administrative Law Judge (ALJ) Steven J. Howard.

**APPEARANCES**

James R. Shetlar, of Overland Park, Kansas, appeared for the claimant. Kendra M. Oakes, of Kansas City, Kansas, appeared for Richardson Hauling, Inc., and Clarkson Construction Co. and their insurance carriers. Jeffrey Dehon, of Kansas City, Kansas, appeared for the Kansas Workers Compensation Fund.

**RECORD AND STIPULATIONS**

The Board has adopted the same stipulations and considered the same record as did the ALJ, consisting of the transcript of Motion Hearing from June 8, 2015, with exhibits attached and the documents of record filed with the Division.

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<sup>1</sup> Claimant is now deceased. He passed away on March 29, 2013.

**ISSUES**

In his Application For Hearing filed on June 12, 2009, claimant alleged an April 10, 2008 work-related accident. The ALJ found that under the provisions of K.S.A. 44-523(f), the matter should be dismissed, and no additional time should be granted to claimant for the filing of an amended E-1. Therefore, respondent's request to dismiss the claim was sustained.

Claimant appeals, arguing the claim should not be dismissed under K.S.A. 44-523(f) because claimant has good cause to receive an extension of time. Claimant's counsel argued that, after claimant died, there was a need to administer the estate and determine a personal representative to add or substitute in the claim, therefore an extension was appropriate. Claimant's counsel further contends the claim should not be dismissed for an untimely filed extension of time for the following reasons: the motion of extension was filed within five years of the Amended Application for Hearing; there was constructive notice of a necessary extension of time within five years of the Application for Hearing; the motion for extension does not have to be filed within the five year period; respondent did not raise the issue of dismissal in a timely manner and is thus estopped from requesting a dismissal under K.S.A. 44-523(f); K.S.A. 44-523(f) is unconstitutional as a violation of claimant's right to due process, equal protection and quid pro quo; K.S.A. 44-532(f) is unconstitutional, acting like a reverse statute of repose or statute of limitations and the statute has been repealed by a new statute in 2011 such that no statute of limitations was in effect for the 2008 accident.

Respondent contends the Order should be affirmed.

Claimant raises the following issues on appeal:

1. Does K.S.A. 44-523(f) allow for a hearing on good cause for an extension even after the five-year period has passed?
2. Does an amended application, or application to implead the Fund, extend the five-year period under K.S.A. 44-523(f)?
3. Was the old law under K.S.A. 44-523(f) repealed by the new law enacted in 2011?
4. Is K.S.A. 44-523(f) constitutional under quid pro quo, due process and equal protection and acting like a reverse statute of limitations?
5. Does claimant have good cause for an extension of time under the statute?

**FINDINGS OF FACT**

Claimant alleged a work-related accident on April 10, 2008, when he stepped on a nail while employed by Hutch Trucking and Excavation. Claimant filed an Application for Hearing on June 12, 2009, against Hutch Trucking and Excavation as well as Richardson

Hauling as a statutory employer. Claimant then filed an Amended Application for Hearing on February 24, 2010, to include Clarkson Construction Co., as an additional statutory employer. Claimant died of unrelated causes on March 3, 2013. A timeline indicating the dates of the various filings is included below.

Timeline

6/12/09 -- Two Applications for Hearing filed, one involving Richardson Hauling, Inc. and one involving Hutch Trucking & Excavating

2/24/10 -- Amended Application for Hearing filed adding a new employer, Clarkson Construction Co.

3/3/13 - - Claimant dies of non-work related causes.

4/5/13 -- Workers Compensation Fund implead because Hutch Trucking and Excavating did not have workers compensation insurance and is insolvent.

11/18/13 -- Prehearing Settlement Conference Held.

4/29/14 -- Motion to add or substitute personal representative for claimant's estate filed - No response from ALJ.

8/20/14 - Suggestion of Death filed with the Division.

2/25/15 -- Claimant filed a Motion for Extension of Time.

3/4/15 -- Application for Dismissal filed by Richardson Hauling for lack of prosecution.

3/5/15 -- Application for Dismissal filed by Clarkson Construction Co. for lack of prosecution.

6/8/15 - Motion Hearing Held.

Claimant's Motion for Extension of Time was actually filed with the Division by fax on February 24, 2015, at 18:48, (6:48 pm), making the effective date February 25, 2015.<sup>2</sup>

**PRINCIPLES OF LAW AND ANALYSIS**

K.S.A. 2007 Supp. 44-523(f) states:

(f) Any claim that has not proceeded to final hearing, a settlement hearing, or an agreed award under the workers compensation act within five years from the date

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<sup>2</sup> K.A.R. 51-17-2(g)(6).

of filing an application for hearing pursuant to K.S.A. 44-534, and amendments thereto, shall be dismissed by the administrative law judge for lack of prosecution. The administrative law judge may grant an extension for good cause shown, which shall be conclusively presumed in the event that the claimant has not reached maximum medical improvement, provided such motion to extend is filed prior to the five year limitation provided for herein. This section shall not affect any future benefits which have been left open upon proper application by an award or settlement.

K.A.R. 51-17-2(g)(6) states:

(6) Service by fax is complete upon generation of a transmission record by the transmitting machine indicating the successful transmission of the entire document. Service that occurs after 5:00 p.m. shall be deemed to have occurred on the next day.

Claimant's alleged date of accident is April 10, 2008. Applications for Hearing were filed against the various alleged employers/statutory employers on June 12, 2009, and February 24, 2010. Claimant's Motion for Extension of Time was filed with the Division by fax at 6:48 p.m. on February 24, 2015. Per Kansas Administrative Regulation 51-17-2, the effective date of that filing is February 25, 2015, one day past the five year limitation set forth in the statute.

The most fundamental rule of statutory construction is that the intent of the legislature governs if that intent can be ascertained.<sup>3</sup> When a statute is plain and unambiguous, the court must give effect to the legislative intention as expressed in the statutory language.<sup>4</sup>

The ALJ correctly recognized the limitations contained in K.S.A. 2007 Supp. 44-523(f). If the five year limitation has passed, without a final hearing, settlement hearing or agreed award, and if no motion to extend was filed prior to the running of that five year limitation, the ALJ has no choice but to dismiss the matter for lack of prosecution. Claimant's five year statute of limitations passed on February 24, 2015. Claimant's Motion was not effective until February 25, 2015. The Board rejects claimant's argument that the filing of an Amended Application for Hearing adding a new respondent somehow extends the time limit against the parties named in the original Applications. However, even if that argument were correct, the filing of claimant's motion was over five years from the time of the filing of the Amended Application, and therefore, also outside the time limit allowed.

Claimant raises an issue regarding the appropriate statute to be used in this matter, noting the change in the limitation with the amendments to the Kansas Workers Compensation Act (Act) in 2011. The Board agrees with claimant that the appropriate

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<sup>3</sup> *Winnebago Tribe of Nebraska v. Kline*, 283 Kan. 64, 150 P.3d 892 (2007).

<sup>4</sup> *Hall v. Dillon Companies, Inc.*, 286 Kan. 777, 189 P3d. 508 (2008).

statute is the one in effect on the date of accident. Claimant also argues the language of the statute requiring the motion to extend be filed within the five year limitation only effects the conclusive presumption status of claimant under the statute. The conclusive presumption language applies to whether claimant has reached maximum medical improvement. It does not broaden claimant's right to file the motion to extend.

Claimant further contends there was good cause for an extension under the Act. However, that issue does not come before the ALJ or the Board unless the motion to extend is filed prior to the running of the statute of limitations contained in the statute, which, in this instance did not happen.

Claimant argues the doctrine of equitable estoppel should prevent respondent from seeking a dismissal of this matter as respondent failed to file its Motion to Dismiss prior to claimant's Motion to Extend. Furthermore claimant seems to contend that, as respondent failed to raise the issue of dismissal prior to claimant filing his Motion to Extend, respondent, in some way, misled claimant. For equitable estoppel to apply, a party must show that another party, by its acts, representations, admissions, or silence when it had a duty to speak, induced it to believe certain facts exist. The party must also show it rightfully relied and acted upon those beliefs and would now be prejudiced if the other party were permitted to deny the existence of those facts.<sup>5</sup>

Claimant has failed to show any respondent had any duty to speak regarding the dismissal of this matter or in any way induced claimant to believe any respondent had decided not to file a motion to dismiss. No respondent had a statutory duty to raise this issue. Therefore, the doctrine of equitable estoppel has no application in this matter.

Finally, claimant contends the provisions of K.S.A. 2007 Supp. 44-523(f) are unconstitutional for several reasons. The Board has held many times in the past that the Board is not a court established pursuant to Article III of the Kansas Constitution and does not have the authority to hold an Act of the Kansas Legislature unconstitutional. Claimant may preserve those arguments for future determination before a proper court.

### **CONCLUSIONS**

After reviewing the record compiled to date, the Board concludes the Order should be affirmed. Claimant failed to take this matter to a regular hearing, settlement hearing or agreed award within five years of the filing of his Application for Hearing and claimant's Motion for Extension was also outside the allowed time limit set forth in the statute.

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<sup>5</sup> *United American State Bank & Trust Co. v. Wild West Chrysler Plymouth, Inc.*, 221 Kan. 523, 561 P.2d 792 (1977).

**DECISION**

**WHEREFORE**, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Steven J. Howard dated June 25, 2015, is affirmed and claimant's claims against all respondents in this matter are dismissed for lack of prosecution.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of September, 2015.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

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Steven J. Howard, Administrative Law Judge